The doctors recommended a blood transfusion, which she declined to accept since she did not believe it to be a suitable medical remedy and also because consumption of human blood is contrary to the Biblical injunction to "abstain from blood," as set out in the Acts of the Apostles, ch. 15, v. 29.

Patient, so far as her weakness would allow, and her husband who accompanied her had, during the course of the day, several long discussions with the doctors, affirming their objection to consumption of human blood. They also filed with the hospital the document entitled "Blood, Medicine and the Law of God" (Watchtower, Brooklyn, New York, 1961), which is Exhibit 1 to Exhibit D, Appendix C, *infra*. Additionally, patient and her husband offered to sign a release absolving the hospital of liability for any untoward result of the course of treatment chosen by the patient. (Appendix C, Exhibits D and E, pp. 42a-44a)

During the afternoon of September 17, 1963, at an hour not disclosed by the record, attorneys for the hospital approached Judge Tamm of the United States District Court and asked him to make an order authorizing the hospital to transfuse the adult patient against her will. Judge Tamm refused. (Appendix C, Exhibits A and B, pp. 34a, 35a)

Next the hospital attorneys went to the chambers of Judge Wright of the United States Court of Appeals at 4 p.m. Judge Wright proceeded to the hospital. Here he spoke to the patient and her husband. Both refused to agree to a transfusion. (Appendix C, Exhibit B, p. 36a) Judge Wright then returned to the doctors' room, where ten or twelve doctors and a Roman Catholic priest, president of the hospital, all tried to explain to the patient's husband that his religious views were in error. (*Op. cit.*) Judge Wright, acting on behalf of the United States Court of Appeals, thereupon signed the order and filed afterward a memorandum opinion. (Appendix C, Exhibit A, pp. 33a-34a)

B. *The decision of the Court of Appeals.*

Petitioner is asking the Court to grant certiorari to review an order of the United States Court of Appeals for the District of Columbia. The order was originally made by Judge Wright and was subsequently confirmed by the full court when it denied, on a split decision, the rehearing *en banc* requested by the petitioner.

The Court divided with respect to rehearing as follows:

Chief Judge Bazelon and Judges Fahy and McGowan	Denied without reason.
Judge Washington	Denied because the order had expired.
Judge Wright	Alone would justify the original order.
Judge Danaher	Would dismiss for lack of a case.
Judge Miller, dissenting, joined by Judges Bastian and Burger:	Would expunge the order from the records of the Court.
Judge Burger, in a separate dissent (joined by Judges Miller and Bastian)	Would dismiss for lack of a justiciable controversy, explaining that the order made by Judge Wright was beyond his judicial powers and in an area reserved to the individual.

REASONS FOR GRANTING THE WRIT

I.

It is submitted that the Supreme Court should review this case because the subject matter does not present a justiciable case or controversy within the power of the federal judiciary, and no order should have been made by the United States Court of Appeals. Fundamental to a determination of this case is the delineation for both judges and individual citizens of the area of judicial control of private decisions, the right to be let alone and the whole basis of doctor-patient-hospital relationship.

Judge Miller, in his dissent in the court below, which was joined by Judges Bastian and Burger, has demonstrated the broad implications of this question, stating, "I suggest it is not correct to suppose that, where there is a serious emergency in life, a judge of a district court or a circuit court may act to meet it, regardless of whether he is empowered by law to do so. This situation shows the truth of the adage that hard cases make bad law." (See Appendix A, p. 2a.)

Judge Burger, in his separate dissent in the court below, which was joined by Judges Miller and Bastian, has posed the problem very clearly: "Philosophers and theologians have pondered these problems and different religious groups have evolved different solutions; the solutions and doctrines of one group are sometimes not acceptable to other groups or sects. Various examples readily come to mind: a crisis in childbirth may require someone to decide whether the life of the mother or the child shall be sacrificed; absent a timely and decisive choice both may die. May the physician or hospital require the courts to decide? A patient may be in a critical condition requiring, in the minds of experts, a certain medical or surgical procedure. If the patient has objections to that treatment based on religious conviction, or if he rejects the medical opinion, are the courts empowered to decide for him?" (Appendix A, p. 15a)

This case raises for determination for the first time in this Court the interrelated problems of the rights and duties of individual citizens as patients, the constitutional guarantee of freedom of religion as it applies to doctor-patient relationship, the rights and duties of doctors and hospitals in relation to a patient who rejects treatment, the duties of judges and the necessary area of restraint that must be observed. These problems are of the utmost significance to a very broad segment of our population and go to the very heart of a vital area of our jurisprudence.

It is standard law that a doctor-patient-hospital relationship is purely a contractual one, from which either party is entitled to withdraw should he disagree with the *modus operandi* of the contracting partner. Suddenly, for the first time in history, there is thrust into this private contractual relationship the coercive power of the federal judiciary.

The very fact that this is the first time any federal court has sought to exercise such power is of significance in itself. It demonstrates that judges have long recognized that they simply do not have the authority that the court below purported to exercise. The three dissenting judges of the court below were strongly of the opinion that this issue was a purely private matter that created no justiciable controversy in which the federal judiciary could interfere.

Furthermore, of all of the ten judges in the two courts below, Judge Wright alone has held that the federal judiciary does have the power that has been exercised. His arguments range in an area of supposition and probability, which only emphasizes the insupportable position in which he finds himself. Judge Burger's quotation from Cardozo demonstrates how the court below has stepped outside the law and succumbed to the temptation warned against in *The Nature of the Judicial Process*: "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pur-

suit of his own ideal of beauty or of goodness." (Quoted by Judge Burger, Appendix A, p. 4a.)

It is the submission of petitioner that the order below is not made in the exercise of any lawful judicial authority. It is an effort "to innovate at pleasure." It is a judicial pursuit, not of law, but of "his own ideal of beauty or of goodness." This is not the function of the federal judiciary. There is here no justiciable controversy. The court below has invaded a field left to the individual and has violated the principles of the Constitution. The case eminently calls for granting of the writ and review by this Court.

Reflection on the implications of the decision below will quickly make apparent the dangers that are inherent in it and the importance of this Court's correcting it.

If the federal judiciary is to invade the private area of doctor-patient contract in this case, one must expect that the same principle will be applied in all others. Suppose a patient declines an appendectomy that a doctor thinks is necessary; is a judge in any position to start making this decision instead of the patient? Suppose the doctor wants to sterilize a woman because a future pregnancy may cause her death and the patient refuses on religious or other grounds: is a judge entitled to decide for her? Judge Wright is apparently ready to decide all such issues: "In this area, failure of the courts to declare the law would not place the responsibility for decision in the executive or legislative branches of government. Judicial abdication would create a legal vacuum to be filled only by the notions, and remedies, of the private parties themselves. . . . I determined to act on the side of life." (Appendix B, pp. 22a, 32a)

What side is that? The mere fact that one patient survived a particular judge-ordered treatment surely does not prove that this patient would have died without it, nor does it prove that the next patient will not die with it! The accident of recovery in one case cannot logically prove that 'judges know best.' They do not have any special knowledge

in this field, and, in any event, such decisions are not lawfully before them.

A Christian Scientist may not believe in hospital and medical treatment at all! If he is to have equal treatment and equal interference with his private decisions, like petitioner, surely the judiciary must be prepared to have him arrested and taken by main force to some place he can receive treatment that he finds objectionable. It is common knowledge that the Roman Catholic Church does not believe in abortion, even to save the life of a mother who could perhaps be saved to bear more children as well as care for those she has already. Every argument in the case at bar would equally apply to that situation. Is the judiciary now prepared to invade the medico-religious precincts of Roman Catholic institutions too!

These examples could be multiplied *ad infinitum* over every disputed medical practice. What a Pandora's box of thankless and insoluble problems is being loaded on the judiciary by this extreme and insupportable extension of judicial control! Is the federal judiciary now to be a combination of midwife-cum-father-confessor to journey around the country interfering in private decisions and removing from the free citizens of this nation the privilege and responsibility of asserting themselves as people, not chattels, as responsible members of the community, not as faceless ciphers under a rule of despotism!

If a court is allowed to overrule the decision of the patient in this case, it must henceforth be the duty of the judges to abandon the courthouse and run out to every hospital where a free citizen of the United States commits the heresy of having an opinion of his own that disagrees with the view of a doctor! Surely the law is not such that the American people must henceforth be a nation of strait-jacketed conformists under constant threat of the coercive force of the federal judiciary, ever ready to be used against anyone having the courage to disagree with what is currently accepted.

It is submitted that no one has the right to remove from free citizens the area of private decision and to substitute the practices of state-controlled paternalism. Appropriate here are the words of John Stuart Mill: "A State which dwarfs its men, in order that they may be more docile instruments in its hands even for beneficial purposes—will find that with small men no great thing can really be accomplished."[2]

Judge Burger in his dissent, joined by Judges Bastian and Miller, has wisely pointed to the need for judicial restraint when he says that "this is precisely the area in which restraint is called for in light of the absolute nature of our powers and the finality which often, as here, attends our acts. But we should heed Cardozo's counsel of restraint and reconcile ourselves to the idea that there are myriads of problems and troubles which judges are powerless to solve; and this is as it should be. Some matters of essentially private concern, and others of enormous public concern, are beyond the reach of judges." (Appendix A, p. 16a)

If the counsel of restraint of Judge Burger is to be ignored, how far does the rule extend? It is submitted that if this private contractual field is now to become subject to judicial supervision, then there is a basis for reviewing every other personal decision.

But this counsel of restraint has been ignored. The decision below is actually a new milestone in the invasion of the liberties of the American people. Its motivation is not the thinking of a free state but the paternalistic philosophy of state control.

Judge Wright apparently sees no problem in judicially invading every facet of human life. He says: "Judicial abdication would create a legal vacuum to be filled only by the notions, and remedies, of the private parties themselves." (Appendix B, p. 22a)

[2] *Liberty*, ch. 3. See also *The Oxford Dictionary of Quotations*, 2d ed., pp. 338-339, Geoffrey Cumberledge, Oxford University Press, London.

It is submitted that the thinking behind this judgment is an affront to the principles of personal liberty, of the worth of the individual, upon which this nation is founded. To allow this judgment to stand is to adopt the philosophy of Judge Wright as the law of the District of Columbia. If this writ is denied a dangerous precedent is established for other judicial circuits.

It is notable that of the ten judges who considered this case (nine in the Court of Appeals and Judge Tamm of the District Court), only Judge Wright has adopted the extreme views expressed at length in his judgment. Not one other judge has spoken in support of the action taken. Yet such are the vagaries of litigation that the opinion of one single judge of a court of appeals stands now as a precedent of the United States Court of Appeals. Good administration of justice simply cannot countenance such a result.

Petitioner says with the utmost earnestness that this case should be taken in for review. The principles involved are of first impression and of the broadest application.

The doctrine of emergency cannot be used as the reason or excuse for treating as a justiciable controversy a situation that does not so qualify and thereby extend judicial power into an area which the law does not authorize. This essentially private problem cannot be converted by the courts into a justiciable controversy by the expedient of saying "It's an emergency." This is apparently the error into which Judge Wright has fallen, approved by the Court of Appeals. It is submitted that the doctrine of emergency cannot justify ignoring the forms of procedure as well as the statutory and common-law limitation of the powers of the judge, thus furnishing a basis for interfering with every facet of life.

It was long ago decided under circumstances of much more impelling public emergency than the issue at bar, that emergency is no excuse for abandoning the individual liberties protected by the irrepealable provisions of the Constitution. Petitioner relies on the decision of Mr. Jus-

tice Davis in Ex parte *Milligan*, 4 Wall. 2 (1865): "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of men than that any of its provisions can be suspended during any of the great exigences of government." (Pp. 120-131)

The argument of expediency as a basis for eroding away constitutional principles is forcefully answered by Mr. Justice Cardozo in his well-known work *The Nature of the Judicial Process*: "The utility of an external power restraining the legislative judgment is not to be measured by counting the occasions of its exercise. The great ideals of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions, and consecrating to the task of their protection a body of defenders. By conscious or subconscious influence, the presence of this restraining power, aloof in the background, but none the less always in reserve, tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle, to hold the standard aloft and visible for those who must run the race and keep the faith. . . . Great maxims, if they may be violated with impunity, are honored often with lip-service, which passes easily into irreverence."

In the case at bar it is no longer the legislature but the court whose actions are questioned. Surely the judgment below has adopted expediency in place of principle. Petitioner has been denied due process of law; her freedom and right to be let alone have been removed.

The doctrine that emergency justifies shortcuts to "quick and easy justice" is effectively answered by the comment of

Yale University Press, New Haven, 1921, pp. 92-94.

Mr. Justice Douglas in his address to the American Law Institute (28 Notre Dame Lawyer, p. 497): "History shows that Governments bent on a Crusade, or officials filled with ambitions have usually been inclined to take short cuts. The cause being a noble one (for it always is), the people being filled with alarm (for they usually are), the government being motivated by worthy aims (as it always professes), the demand for quick and easy justice mounts. These short cuts are not as flagrant perhaps as a lynching. But the ends they produce are cumulative; and if they continue unabated, they can silently rewrite even the fundamental law of the nation."

The law of this nation and the duties of the federal judiciary do not make room for arguments of expediency, for quick and easy justice, for shortcuts. That is why we have a Constitution to protect people and the nation from the emotions of the moment that undermine the consecrated legal principles that have protected the nation against such unwisdom and made it the country it is today.

The doctrine that an emergency requiring in the opinion of the judge hasty action of some kind as a justification for ignoring principles of law is a very dangerous principle corrosive of law and the orderly administration of justice. It cannot be allowed to stand unchallenged. The situation in this case calls for review on certiorari and a reassertion by this Court of the valuable and balanced principles of constitutional law and individual liberty.

II.

There is involved here a serious constitutional principle of the right to be let alone. Petitioner has, within the meaning of the Fifth Amendment, been deprived of liberty and property (her own body being the most valuable property in her possession) without due process of law. Her right of decision as a free citizen has been arbitrarily removed.

An animal is a chattel with no right of self-determination as to the treatment it will receive. A person in servitude is a chattel with no right of self-determination as to the treatment he will receive. Petitioner was treated as a chattel with no right of self-determination as to the treatment she would receive. But in this case it was neither a chattel nor a slave that was so treated, but a free citizen of the United States! Certainly the Fifth Amendment has not ceased to operate. As was stated by Judge Burger in his dissenting judgment: "Mr. Justice Brandeis, whose views have inspired much of the 'right to be let alone' philosophy, said in *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928), (dissenting opinion): 'The makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.'" (Appendix A, p. 14a)

This right, which is one of the guaranteed freedoms belonging to every citizen, has been denied in this case. This is not a minor item. The principles involved are major violations of good administration of justice and as such call for the granting of certiorari and review by this Court.

III.

A further feature of importance in this case is the denial by the court below of the guaranteed right of freedom of religion and freedom of conscience. The issue of religious liberty that is predominant in the case makes it peculiarly one that calls for review by our highest tribunal. The rights under consideration here are in "the preferred position the freedoms of the First Article occupy," (*Prince* v. *Massachusetts*, 321 U. S. 158, 167). It was stated further by Judge Edgerton in *Busey* v. *District of Columbia*, 138 F. 2d 592 (D. C. Cir. 1943): "Freedoms of speech, press, and religion are entitled to a preferred constitutional position because they are of the very essence of a scheme of ordered liberty."

They are essential not only to the persons or groups directly concerned but to the entire community. Our whole political and social system depends upon them. Any interference with them is not only an abuse but an obstacle to the correction of other abuses.[1] The judgment below is a clear invasion of the conscience and freedom of petitioner in violation of the guarantees of the First Amendment. This case involving violation of her liberties has a preferred claim to review by this Court on certiorari.

The Virginia Bill of Rights has often been quoted in this Court as making explicit the principles outlined in the First Amendment: "All men are equally entitled to the free exercise of religion, according to the dictates of conscience, unpunished and unrestrained by the magistrates, unless under color of religion, any man disturb the peace and happiness of society." Not until society itself is threatened is there any basis for denying that freedom of conscience, which is the sacred right of the individual.

That petitioner's objections are religious is clear from the memorandum opinion of the court below. (See Appendix C, Exhibit B.) An explanation is found in the record: "The matter was not to be taken lightly. Any violation of the law on blood was a serious sin against God, and God himself would call the law violator to account. 'As for any man of the house of Israel or some alien resident who is residing as an alien in your midst who eats any sort of blood, I shall certainly set my face against the soul that is eating the blood, and I shall indeed cut him off from among his people.'—Leviticus 17:10." Another specific Bible text relied on is in the Book of the Acts of the Apostles, chapter 15, verses 28-29, which reads: "For it seemed good to the Holy Ghost, and to us, to lay upon you no greater burden than these necessary things; that ye abstain from meats offered to idols, and from blood, and from things strangled, and from fornication: from which if ye keep yourselves, ye

[1] *Palko v. Connecticut*, 302 U. S. 319, 325 (1937).

shall do well." (Authorized Version) (See Appendix C, Exhibit D, Exhibit 4, pp. 5, 7.)

Petitioner believes the Bible to be the Word of God and accepts the instruction of Holy Writ to "abstain from blood." She regards this conscientiously as a religious obligation. This factor is recognized as being part of the case. The Constitution protects her conscientious right to believe and to act in accordance with the dictates of her own conscience, and there is no power to interfere with her. Persons of the Jewish faith abstain from pork. Persons of the Roman Catholic faith abstain from meat on certain fast days. Persons of the Christian Scientist faith abstain from medical care. The First Amendment protects the individual conscience in all such instances. Surely the Court would not countenance any subterfuge, no matter how subtle or well intentioned, that would violate these conscientious views. It is submitted that the rights of petitioner here are no less sacred and no less entitled to the protection of the constitutional guarantees of the First Amendment.

Involved are the views of a minority group that differ from those commonly accepted. Surely that cannot be a good and valid reason for denying them. It was said in *Barnette* v. *West Virginia State Board of Education*, 47 F. Supp. 251 (S. D. W. Va. 1942), affirmed 319 U. S. 624 (1943): "Courts may decide whether the public welfare is jeopardized by acts done or omitted because of religious belief; but they have nothing to do with determining the reasonableness of the belief. That is necessarily a matter of individual conscience. There is hardly a group of religious people to be found in the world who do not hold to beliefs and regard practices as important which seem utterly foolish and lacking in reason to others equally wise and religious; and for the courts to attempt to distinguish between religious beliefs or practices on the ground that they are reasonable or unreasonable would be for them to embark upon a hopeless undertaking and one which would inevi-

tably result in the end of religious liberty. There is not a religious persecution in history that was not justified in the eyes of those engaging in it on the ground that it was reasonable and right and that the persons whose practices were suppressed were guilty of stubborn folly hurtful to the general welfare." (P. 253)

Mr. Justice Murphy warned in his powerful dissent in *Prince* v. *Massachusetts*, 321 U. S. 158, 175: "No chapter in human history has been so largely written in terms of persecution and intolerance as the one dealing with religious freedom. From ancient times to the present day, the ingenuity of man has known no limits in its ability to forge weapons of oppression for use against those who dare to express or practice unorthodox religious beliefs. And the Jehovah's Witnesses are living proof of the fact that even in this nation, conceived as it was in the ideals of freedom, the right to practice religion in unconventional ways is still far from secure. . . . To them, along with other present-day religious minorities, befalls the burden of testing our devotion to the ideals and constitutional guarantees of religious freedom. We should therefore hesitate before approving the application of a statute that might be used as another instrument of oppression. Religious freedom is too sacred a right to be restricted or prohibited in any degree without convincing proof that a legitimate interest of the state is in grave danger."

There is no right of the state in grave danger here. If there is any danger it is to the individual and she is prepared to accept the danger. There is no interest of the state involved; there is no jurisdiction in the courts to deny this liberty to the individual citizen. This is an arbitrary and insupportable invasion of her right to make a private decision.

Judge Wright has relied on *Jacobson* v. *Massachusetts*, 197 U. S. 11 (1905), and an *obiter dictum* comment of Chief Justice Waite in *Reynolds* v. *United States*, 98 U. S. 145, 166 (1878), as supporting the action he has taken. It is sub-

mitted that neither of these cases lends any support to the order below.

The first case relied on was *Reynolds* v. *United States*, 98 U. S. 145. Reynolds was charged with having entered into a bigamous marriage, contrary to the statute. Part of the defense was that this was a religious duty on his part. Chief Justice Waite pointed out that something that was a religious belief would not excuse murder by way of ritual sacrifice nor would it justify suicide in the case of a widow who burned herself on the funeral pyre of her husband. These two items were illustrations that were *obiter* in the case. That the foregoing illustrations are not really applicable is demonstrated by Judge Wright himself, who found "the simple fact that Mrs. Jones did not want to die. Her voluntary presence in the hospital as a patient seeking medical help testified to this." (Appendix B, p. 31a)

Chief Justice Waite, in the *Reynolds* case, carefully distinguished between religious exemption for *non*feasance and *mis*feasance, stating, "But, when the offence consists of a *positive act which is knowingly done*, it would be dangerous to hold that the offender might escape punishment because he religiously believed the law which he had broken ought never to have been made." (Italics added.) 98 U. S. at page 167.

In the case at bar petitioner has done no positive act to injure anyone. At most it is a matter of *non*feasance on a question which she is entitled to decide for herself. There is no positive act and there is no breach of statute. There is nothing contrary to good morals and nothing that is inimical to the public interest in the fact that she disagrees with a particular type of medical treatment. In short, this is simply a field in which courts are not entitled to intervene, because none of the factors that would support a court order is present.

Jacobson v. *Massachusetts*, 197 U. S. 11 (1905), cited by Judge Wright, is equally inapplicable. There vaccination

was required by statute when, in the opinion of the board of health, it "was necessary for the public health or the public safety." There was at the time of this situation an outbreak of smallpox. The Court said that "the rights of the individual in respect to his liberty may at times, under the pressure of great dangers, be subjected to such restraint . . . as the safety of the general public may demand." (197 U. S. at page 29) There was no question of violation of conscience in the *Jacobson* case. The interference was authorized by statute and there was, due to the outbreak of smallpox, a danger to the general public: "a clear and present danger." There is no real relationship between the situation that motivated the Court in the *Jacobson* case and the circumstance we have at bar.

Judge Burger has adopted this view: "The cases in which vaccination was compelled for smallpox and other communicable diseases are not in point for such compulsion was enforcement of public health measures under the police power." (Appendix A, note 4, p. 14a)

The court below also relied on the fact that the state, as *parens patriae*, has sometimes ordered that treatment be given to children. The petitioner is not a child. Attention is drawn to the carefully reasoned opinion of *In re Tattendario*, 21 Pa. Dist. R. 561 (Q. S. Phila. 1912): "The science of medicine and surgery, notwithstanding its enormous advances, has not yet been able to insure an absolute correct diagnosis in all cases, and still less an absolute prognosis. There is always a residuum of the unknown. . . . The law of average, however, is of no benefit to the exceptional individual who succumbs. For him, there is no longer a percentage of chances. His loss is total. It is this contingency which every adult person weighs whenever a serious operation is to be performed and no one has ever questioned his legal right to decide the question for himself."

That this is a serious operation is established by the fact that the best surgical information indicates that there

are at least 16,500 deaths per annum resulting from blood transfusions.[5]

In all it may be said that the order made violates the constitutional rights of the petitioner. It has been erroneously issued, is without legal justification and should now be set aside.

It may be argued that the decision of petitioner was foolish and unreasonable, that the hospitals and doctors meant well and that, in fact, she survived. These considerations are actually irrelevant from a legal standpoint because "courts cannot permit consequences to influence their judgments."[6] Additionally, this Court has often declared its determination not to decide what is either reasonable or heretical in the field of religion. As was well stated in *Watson* v. *Jones*, 80 U. S. 679, 728 (1872): "In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."

Also, before labeling petitioner's decision as foolish, other balancing factors should be considered. Medicine is an inexact science and always has been. What it accepts and promotes today may be regarded as highly dangerous tomorrow. Let us not forget that it was blood therapy of a kind that caused the death of George Washington, first president of the United States. Some may feel that was long ago and things are now different. Consider the statement of an experienced pathologist, Dr. J. H. Dible, London, England: "Medical progress is a study of trial and error, of false paths, of whole generations under the sway

[5] *Complications in Surgery and Their Management* (Saunders & Co., Philadelphia, 1961), section "Cumulative Mortality from Complications of Blood Transfusion," p. 80.

[6] 14 Am. Jur. 279.

[7] *Life* magazine, February 15, 1963.

of wrong ideas leading to wrong treatment and God knows what in the way of casualties—and the old tale yet goes on. A friend of mine said to me the other day, 'in the 18th century hundreds of people lost their lives through blood being taken out of them needlessly; today people are being killed through blood being put into them needlessly,' and I—who only that morning had seen the body of a young man, dead as the result of an incompatible blood transfusion, given after an operation of convenience—could only agree with him sadly." (See Appendix C, Exhibit D, Exhibit I; page 52 *infra*, p. 43a.)

Much has been said about the danger of anybody's refusing a blood transfusion. Little mention is ever made that there is also a lot of danger from taking one. While it is commonly assumed that there is no medical opinion opposed to the use of blood transfusion, this assumption is not necessarily well founded. There is much medical controversy on the subject, and some very reputable medical writers have expressed the view that transfusion of human blood is doing a lot of harm.

The dangers of blood transfusion have been emphasized by Doctors Artz and Hardy in the well-known surgical work: *Complications in Surgery and Their Management* (Saunders & Co., Philadelphia, 1961). Under the heading "Cumulative Mortality from Complications of Blood Transfusions," the following statement appears: "The annual mortality from only 3 complications of blood transfusion (hemolytic reactions, overload and serum hepatitis) is computed to be 16,500. Although some assumptions used in arriving at this figure may be challenged, one cannot dispute the fact that there is a tremendous loss of life and induced illness from this procedure, which is intended to be therapeutic. In terms of disability and loss of life the sequelae of blood transfusions rival some of our major public health problems."

Postgraduate Medical Journal, Vol. 29, pp. 59, 60.

That the hematocrit level relied on by the doctors of the Georgetown University Hospital is not necessarily the whole answer to this situation, petitioner refers to the following: In an article reprinted in *Postgraduate Medicine*, W. H. Crosby, of the Walter Reed Army Medical Center, reprimands doctors for their overuse and abuse of blood transfusions, saying: "The proper use of blood transfusion . . . poses a problem. The reason for misuse of blood transfusion is that we are not sufficiently aware of the valid indications for this procedure. A surgical operation is not an indication for blood transfusion. Uterine bleeding is not an indication. *Neither is a low hematocrit reading.* Blood transfusion is not a tonic. It is not a placebo. It does not improve wound healing. Nor is it a substitute for careful consideration of the patient and his problem."*

A very useful and exhaustive analysis of blood transfusions from a legal and medical standpoint has appeared in the Canadian Bar Journal, Vol. 3, p. 365. The article is entitled "Religion, Medicine and Law." This work contains many medical quotations, indicating that there is much controversy and difference of opinion inside the medical profession as to the therapeutic value of this practice.

The foregoing factors are cited simply as a matter of balancing the common erroneous assumption that blood transfusion is an undoubted lifesaver. It is always very dramatic in news stories to so pretend, but the truth of the situation does not support it.

But whether it is or not is not fundamental to the present argument. We have a guaranteed constitutional right to exercise freedom of conscience and live, or even die if necessary, according to the individual opinion of right and wrong. A Catholic mother may die for lack of an abortion. A mother and newborn baby may both be lost because of failure to decide on sacrificing the life of one or the other. Many Christian Scientists refuse to go to hospi-

* November, 1959, pp. A12-A40

tals or consult doctors. Can the federal judiciary now become consultant physician in every medico-religious dispute in the whole nation? This is going much too far.

Freedom of religion is a guaranteed right and the moment one gets over the line and begins to interfere in it the problems are myriad. The time to stop this is right now at the start. Let us not forget the words of Mr. Justice Brandeis: "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead v. United States*, 277 U. S. 438, 479 (1928).

The judge who entered the order here challenged no doubt had the best of intentions, he was well meaning. But it is an insidious encroachment on a guaranteed constitutional liberty. The issues here are so vital and far-reaching that the writ should issue forthwith and the matter be reviewed in this Court.

IV.

Although petitioner has had the blood transfusion as ordered by the appellate judge, sitting as the Court of Appeals for the District of Columbia, review of the order should not be denied on the contention that the issue is now moot. This argument was made by respondent in opposition to petitioner's petition for rehearing in the court below and, although apparently accepted by some of the judges, was soundly rejected by the vigorous dissenting opinions.

It is submitted that to hold an order of the type involved here to be moot immediately upon the execution of it would be to forever deprive the litigant of judicial review. In fact, the temporary order would constitute the final order and would not lend itself to any form of hearing or review by an appellate court because of the argument of mootness. This cannot be the law.

The true position has been authoritatively stated as follows: "Where illegal activity is voluntarily discontinued,

the courts may nevertheless issue an injunction to prevent its recurrence, especially if public rights are concerned."[10] This is exactly the position of petitioner. Consider also *Henderson v. United States*, 339 U. S. 816 (1950), where appellant was allowed to attack regulations which had never been applied to him and which had replaced the regulations under which he suffered discrimination.

It is stated in 5 C. J. S. § 1354 (1), page 414: ". . . the question whether an appellate court should pass on the merits of the case which has become moot is discretionary, to a great extent. Moreover, if, although the effect of the particular judgment in question may have ceased or terminated, the principle involved in the case in which the judgment was rendered is a continuing one, courts will sometimes consider the original case in order to avoid the multiplicity of appeals which might otherwise result."

See also 5 C. J. S. § 1354 (3), page 418: "If the right in controversy has expired by lapse of the period of time fixed for its continuance, the appeal will be dismissed. It is otherwise, however, if the right is a continuing one, or interests of a public character are asserted under conditions that may be immediately repeated."[11]

Undoubtedly the argument of mootness will be made in opposition to the present petition for writ of certiorari. But

[10] Quoted from Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States* (Wolfson & Kurland, 1951 ed.), page 520, citing *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290 (1897) and many other authorities.

[11] Cf. *Payne v. Jones*, 210 P. 2d 413 where the Supreme Court of Oklahoma denied a claim of mootness, "since they involve questions of vital public concern, at least one of which has not been decided by this court. . . . we should dispose of the cases on their merits. . . . since such cases soon become moot and it would be difficult to get a decision on the merits before they do become moot. . . . but an exception is recognized in cases involving public rights. . . ." See also *Willis v. Buchman*, 199 S. 886, where the court explained that "on moot questions . . . the appeal will be dismissed . . . unless the question involved is a matter of public interest." See also C. J. S. § 1354 (1), pp. 410-413.

there is sound legal authority that should persuade the Court to reject such a shortsighted contention.

The argument that a case is moot is no answer to the motion when the case involves broad questions of public interest and when the argument is of first impression before the Court. The public interest is in fact so broad and all-embracing that Judge Miller felt impelled to say that "it is not correct to suppose that, where there is a serious emergency in life, a judge of a district or a circuit court may act to meet it, regardless of whether he is empowered by law to do so." (Appendix A, p. 100a)

That this is a continuing controversy and that mootness is negatived is shown by Judge Wright's public announcement that he would do the same thing again.[14] Thus his view is a continuing threat of repetition of the "short cut" approach to justice both to the petitioner and to every other citizen. No one in this jurisdiction is safe.[15]

The illness of petitioner, a bleeding ulcer, is a complaint that tends to repeat itself by recurrent outbreaks. Judge Wright has announced himself as standing ready to overrule her private decision and to remove her right to unmolested freedom of conscience at any time. This, in spite of the fact that the Constitution guarantees that she shall have that unmolested freedom. Proper administration of justice and the orderly conduct of society simply cannot continue when a federal judge stands publicly announcing his intention of denying to this petitioner and to this minori-

[14] *Time*, February 24, 1964. That such is his intention is also clear from his opinion.

[15] Judge Wright has indicated that no other medical or religious problem is involved within the *ratio* of his decision. But his philosophy cannot be confined to any single group or any single fact situation. Consider, too, the comment of Hallam: "I am never very willing to admit as an apology for unjust or cruel enactments, that they are not designed to be generally executed; a pretext often insidious, always insecure, and tending to mask the approaches of arbitrary government."—Hallam, Const. Hist. of England, Vol. 1, p. 125, New York, Crowell ed.

ty group the freedom and the protection under law that is accorded all others.

The Court cannot, it is submitted with respect, countenance the Constitution's being treated as a dead letter, as has been done below. The situation loudly demands that the case be reviewed on the merits and the Court reinstate orderly procedure instead of instant justice that does not allow for due representation of both sides.

Judge Wright has sought to support the correctness of his judgment by the fact that petitioner survived the treatment. She might have survived without it, she might have died from it. Legally both consequences are irrelevant to the considerations that should have influenced the judge in determining at the time of the order his power to act. The basic principle appears in American Jurisprudence, Volume 14, page 279: ". . . courts have no policies and cannot permit consequences to influence their judgments. . . . Courts administer justice by fixed rules which experience and wisdom have demonstrated as necessary in the investigation of truth, even though cases of individual hardship may result from the application of these rules to the various affairs of life. Such hardships will not induce the courts to disregard long-settled rules of law."

It is the function of the judiciary to enforce the law. Policy considerations are in other hands. A strong and respected authority on this point is the great Lord Mansfield who gave judgment in 1770 over the famous outlawry of John Wilkes. In *Rex* v. *Wilkes*, 4 Burr. 2527, Mansfield discussed the proper judicial attitude toward threatened consequences: "It is fit to take some notice of the various terrors rung out . . .: and the tumults which in other places have shamefully insulted all order and government. Audacious addresses in print dictate to us, from those they call the people, the judgment to be given . . . Reasons of policy are urged, from danger to the kingdom, by commotion and general confusion. . . . The constitution does not allow reasons of state to influence our judgment: God forbid it

should: We must not regard political consequences how formidable soever they might be; if rebellion was the certain consequence we are bound to say, 'Fiat Justitia Ruat Coelum.'"[1]

The policy argument is no answer to the claim of petitioner. She has been damaged by the denial of her rights. If requested writ is refused, the door will be open to any litigant to obtain illegal orders of any kind and, when faced up with them, to say, 'The matter is now moot; let the court ignore the violation.' Under such doctrine there would be no way for the injured party to ever get a determination of his rights. That this is not the law can be seen from *Lafayette Dramatic Productions Incorporated* v. *Ferentz*, 9 N. W. 2d 57, where the appellate court held: "We have before us on this appeal only the questions relating to the original or first contract for one year. Notwithstanding such questions and the issues presented by this record might be considered moot, we deem the case of sufficient importance to warrant our decision, even though it may be in the nature of a declaratory decree. . . . However, our conclusion is that what we have said in this opinion would be equally applicable to any renewal or further contract obtained through similar means and under like facts and circumstances."

It has been held that a case should not be dismissed as moot if the public interest is involved, if constitutional principles remain to be decided, if an erroneous precedent has been created or there is a continuing injury. Here we have for decision, not only public and constitutional interests, but those which stand in a special *preferred position*. Interests of such broad and fundamental importance are of such vitality as to furnish a complete answer to the discretionary argument of mootness.

Any questions of great constitutional importance will cause the Court to hold the case for decision notwithstand-

[1] Let justice be done, though the heavens fall.

ing the passage of the event.[15] Where a question of public importance is involved and where it is necessary to provide a guide for the future the Court will decide the question regardless of mootness. In *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498 (1911), at page 515, the Court said: "The question involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress."

Judge Burger in the court below commented on the argument of mootness in footnote 5: "Once granted, no more remained for any court to consider. Were we to view the claims now as moot, we would have to acknowledge their mootness as soon as the challenged order was acted upon. This was in effect not only a form of instant relief but perhaps also instant mootness." (Appendix A, p. 15a)

If the order is instantly self-executing and instantly moot, then a means has been found of ignoring law and order and the jurisdiction of review that is vested in this Court. Thus we can proceed from emergency precedent to emergency precedent with no case ever getting a review or a serious hearing until a pattern of lawlessness is formed and the constitutional guarantees are completely undermined. Surely speedy and arbitrary action, by the fact it is accomplished, under color of, but without authority of law, cannot be forever insulated against judicial analysis. This is a new and dangerous precedent that is of first impression in this Court and indeed in any other court in the United States.

Every aspect of this case reinforces the submission that good administration of justice and the public interest calls for the granting of certiorari and review by this Court.

[15] *Deputy State Supervisor v. State ex rel. Green*, 16 Ohio C. C. R. (n.s.) 244 (1908).

CONCLUSION

Only one judge of the court below has spoken out affirmatively, namely, Judge Wright, who took the emergency action and who has attempted to justify that action by an extensive opinion. No other judge has written anything in support of the action of Judge Wright. However, there are three judges of the court below who have vigorously spoken out against the opinion of Judge Wright, pointing out that in their opinion the action of the United States Court of Appeals for the District of Columbia was setting a dangerous precedent and opening new fields of judicial power and authority contrary to the traditional limitations on the jurisdiction of federal courts. In light of the record as it thus exists, it is submitted that the issue should be resolved, for, in effect, based on the opinions below, the verdict stands three to one. Yet the judgment of the one has prevailed and stands as a precedent of broad and general application derogatory of a vital public interest.

It is submitted that one judge ought not to be allowed to overrule three. Public respect for the administration of justice cannot be maintained if an important issue is left in such an anomalous and inconclusive state. The law should be certain, not uncertain.

WHEREFORE, for all the reasons above stated, this petition for writ of certiorari should be granted.

Respectfully,

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April, 1964.

APPENDICES

TO PETITION FOR WRIT OF CERTIORARI

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Misc. No. 2189

APPLICATION OF THE PRESIDENT AND DIRECTORS OF GEORGETOWN COLLEGE, INC., A BODY CORPORATE

On Petition for Rehearing En Banc

Filed February 3, 1964

Messrs. Edward Bennett Williams and *Peter R. Taft* were on the pleadings for applicant President and Directors of Georgetown College, Inc.

Messrs. Bernard Margolius and *Ralph H. Deckelbaum* were on the pleadings for respondent Jessie H. Jones.

Before: BAZELON, *Chief Judge*, and WILBUR K. MILLER, FAHY, WASHINGTON, DANAHER, BASTIAN, BURGER, WRIGHT and MCGOWAN, *Circuit Judges*, *en banc*, in Chambers.

ORDER

Upon consideration of a pleading styled "Petition for Rehearing En Banc" in the above-entitled matter and an opposition thereto, it is

ORDERED by the court *en banc* that said petition is denied.

Per Curiam.

WASHINGTON, *Circuit Judge, concurring*: Mrs. Jones has left the hospital, and the order of September 17th has expired by its own terms. Under these circumstances, we are in my view precluded from passing on the merits of the questions presented, and hence from holding a rehearing *en banc*.

JUDGE DANAHER would dismiss for lack of a case or controversy.

WILBUR K. MILLER, *Circuit Judge*, dissenting: In giving the reasons for my unwillingness to agree to the foregoing order, I think it expedient to begin at the beginning by sketching the story of the circumstances which led to its entry; for, standing alone, it has the appearance of an innocuous routine order.

On September 17, 1963, two attorneys appeared at the chambers of District Judge Edward A. Tamm and tendered the following order, which they requested him to sign:

> "ORDER
>
> United States District Court for the
> District of Columbia Civil Division
>
> "In re: Application of the President and
> Directors of Georgetown College,
> Inc., a Body Corporate
>
> "This cause having come on to be heard upon application of The President and Directors of Georgetown College, Inc., a body corporate, owning and operating Georgetown University Hospital, and it being represented by counsel for the applicant that a Mrs. Jesse [*sic*] E. Jones is presently a patient at Georgetown University Hospital and that she is in extremis and it being further represented that the physician in attendance, the chief resident at Georgetown Hospital, Edwin Westaria, is of the opinion that blood transfusions are necessary immediately in order to save her

life and it being further represented by the applicant that consent to the administration thereof can be obtained neither from the patient nor her husband; it is therefore

"ORDERED that the applicant acting through its duly accredited and licensed physicians in attendance may administer such transfusions as are in the opinion of the physicians in attendance necessary to save her life."

Although the proposed order was styled "Application of The President and Directors of Georgetown College, Inc., a Body Corporate," there was no such proceeding pending in the District Court; there had been no complaint, petition or formal written application filed. The only "application" was the oral request of the attorneys that the tendered order be signed and entered. To this day, there is nothing on file in the District Court Clerk's office with reference to this "application." Judge Tamm endorsed on the paper the word "Denied," which of course meant that he was denying the oral application for the order. It is plain, I think, that at the very least Judge Tamm's denial was based on the fact that there was nothing before him upon which he could act, that the jurisdiction of the District Court had not been properly invoked, and that there was no pending case or controversy.

About 4:00 p.m. on September 17 the same attorneys appeared, unannounced, at the chambers of a judge of this court and requested an immediate review of Judge Tamm's action denying the application for authority to administer a transfusion to a patient at the hospital, said to be in imminent danger of death from loss of blood. They did not file a written petition for review of Judge Tamm's refusal to sign the order but merely orally requested a single judge to take the action which Judge Tamm had just refused to take. The appellate judge spoke by telephone with the hospital's chief resident physician who confirmed the representations made by counsel and thereupon the judge proceeded to the hospital. There he spoke to the husband of the patient who

advised that, on religious grounds, he would not approve a blood transfusion for his wife. The judge advised the husband to obtain counsel immediately but, after brief consideration, the husband declined to do so. The judge then called at the patient's room and repeated to her what the doctors had said. Her only reply audible to him was, "Against my will."

Then, at 5:20 p.m. on September 17, at Georgetown Hospital, the appellate judge signed the order which Judge Tamm had declined to sign and then signed the following additional order, which was filed by our Clerk the same day:

> "The applicant having appeared before me for the issuance of a writ permitting the applicant to administer such transfusions as are in the opinion of the physicians in attendance necessary to save the life of Mrs. Jesse [*sic*] E. Jones and it appearing that on September 17, 1963, the District Court denied such application; and a hearing having been conducted before me at which all the interested parties were present and upon due consideration had thereon, I signed, pursuant to the provisions of Section 1651, Title 28, United States Code, the attached order granting such relief which counsel had presented to the District Court Judge and which had been denied by him, it is therefore
>
> "ORDERED that the Clerk of this court is hereby directed to file this memorandum order and attachment."

The blood transfusion was accomplished immediately after the order was signed.

On September 19 the appellate judge filed a memorandum concerning his action, in which he said *inter alia*:

> ". . . It was obvious that the woman was not in a mental condition to make a decision. I was reluctant to press her because of the seriousness of her condition and because I felt that to suggest repeatedly the imminency of death without blood *might place a strain*

> *on her religious convictions.* I asked her whether she would oppose the blood transfusion if the court allowed it. She indicated, as best I could make out, that it would not then be her responsibility." (Emphasis added.)

And on September 20—three days after the transfusion had been accomplished—the hospital filed affidavits by four physicians to the effect that the transfusion had been necessary.

On October 14, 1963, Jessie E. Jones, the patient, filed a petition for a rehearing *en banc* and for an order vacating and quashing the order of September 17 which authorized the transfusion. The petition states the question presented as follows:

> "The question is whether a free adult citizen of the United States can be forced against her will to accept medical treatment to which she objects on both religious and medical grounds.
>
> "This case is of vital importance and rehearing should be granted due to the broad implications of the question presented. The right of free exercise of religion and the right of a free citizen to have his body inviolate are all a part of the rights guaranteed by the Constitution. The problem raised here additionally affects all doctor-patient-hospital relationships throughout the entire country. Thus, while the fact issue may be unusual, the principle is broad and vital and these important qualities make this a case which peculiarly calls for reconsideration by the full Court *en banc* and the right of a rehearing."

The petition contains extensive arguments in support of the following propositions:

> 1. "Respondent has a constitutionally guaranteed right to the free exercise of her religion, which includes the right to abstain from blood. The order of the Court and the action of the applicant in forcing

blood upon her is a violation of her conscience and of the liberty guaranteed by the First Amendment to the Constitution of the United States."

2. "Respondent as a free citizen of the United States has been deprived of her liberty by the invasion of her person without due process of law contrary to the Fifth Amendment to the Constitution of the United States."

3. "The precedent created here is a threat to so many other persons that judicial substitution of medical discretion for individual discretion should be examined in principle to see where it is leading."

4. "Respondent is still subject to the order of the Court dated September 17, 1963. Her liberty continues to be infringed until the order is quashed, and the Court should therefore grant a rehearing."

Such is the petition for rehearing *en banc* which is being denied without comment by the foregoing order. I presume the reason which actuates the majority is the theory that the order of September 17 is now moot in that the transfusion has been administered and the patient has left the hospital. The petition for rehearing presents a strong argument to the contrary which merits consideration.

I am not now concerned, however, with the substantive questions presented by the petition for rehearing; I am disturbed by the procedural aspects of the situation. In the description of the nature of the proceedings the petition for rehearing says:

> "The procedure by which the matter came before this Court is not clear to counsel, but no issue is raised on the point at this time."

It seems clear to me, however, that the matter did not properly come before this court and that, had it been duly presented on appeal, one judge of this court was not authorized to make a summary disposition of the matter on the merits.

These procedural defects are, therefore, fatal to the validity of the purported orders entered September 17 by a single judge when no appeal had actually been filed. Argument that a court is justified, in physical circumstances such as were present here, in ordering blood transfusions against the will of an adult patient necessarily presupposes a properly constituted court and an action actually filed and pending before it. Such argument, no matter how extensive and persuasive, cannot validate the action which was taken here because it cannot destroy the basic facts which make the purported orders mere nullities: that no action was filed in the District Court and that no appeal was filed in this court; and that, had there been an actual appeal, a single appellate judge was not authorized to act.

I object to the order which merely denies the petition for rehearing without more, because it leaves in effect the two orders of September 17 as orders of this court which may be cited hereafter as precedents, not only for the summary administration of blood transfusions against the will of the patient, but also for the proposition that one judge of this court, without summoning two of his colleagues to act with him and without any record before him, may take the drastic and unprecedented action which was taken in this matter.

Under Article III, Section 2, of the Constitution of the United States, the judicial power extends only to cases and controversies. Although this Section defines and limits judicial power, it does not prescribe the particular method by which that power may be invoked. The method of invoking it is provided by Rule 3 of the Federal Rules of Civil Procedure, which reads: "A civil action is commenced by filing a complaint with the court." As has been shown, there was no complaint filed here, so a civil action was not commenced and the power of the District Court was not properly invoked. I do not understand that one may institute a civil action merely by entering the chambers of a district judge and asking him to sign a proffered order; nor that an

appeal from his refusal may be taken by orally requesting a single circuit judge to review it.

Even when a case or controversy is properly presented to a Court of Appeals, one judge thereof is not empowered to take the decisive action which was taken here. The determination of such matters is committed to a division of three judges, of which two constitute a quorum, or to the court *in banc*. This is provided by subsections 46(b), 46(c), and 46(d) of Title 28, U. S. Code:

> "(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and hear the cases and controversies assigned as the court directs.
>
> "(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit.
>
> "(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum. (June 25, 1948, ch. 646, 62 Stat. 871.)"

These sections, it seems to me, do not provide for or permit action by a single appellate judge such as that which was taken here. It has been suggested, however, that the Code provision which authorizes one appellate judge to enter an order to preserve the *status quo* pending appeal justifies the procedure employed here. The suggestion is, I think, without foundation. Even if an appeal had properly been in this court from Judge Tamm's refusal to enter the proffered order, the orders entered on September 17 by one judge of this court did not preserve the *status quo* to the

contrary, the orders completely changed the *status quo ante* by granting fully and finally all of the relief sought, thus disposing of the matter on its merits. This fact is confirmed, perhaps unwittingly, by the majority's order denying the petition for rehearing *en banc*, which implicitly relies on mootness.

I think that, instead of merely denying the petition for rehearing, we should dismiss it on the ground that there was no case or controversy presented or determined and that consequently there is nothing to rehear. But, whether the petition for rehearing be denied or dismissed, the purported orders of September 17 should be expunged so there would be nothing in our records which could be cited as a precedent for future similar action by a single appellate judge. We have inherent power to take that action *sua sponte*.

I do not mean to impugn the motives of our colleague who signed these orders. He was impelled, I am sure, by humanitarian impulses and doubtless was himself under considerable strain because of the critical situation in which he had become involved. In the interval of about an hour and twenty minutes between the appearance of the attorneys at his chambers and the signing of the order at the hospital, the judge had no opportunity for research as to the substantive legal problems and procedural questions involved. He should not have been asked to act in these circumstances.

I suggest it is not correct to suppose that, where there is a serious emergency in life, a judge of a district or a circuit court may act to meet it, regardless of whether he is empowered by law to do so. This situation shows the truth of the adage that hard cases make bad law.

I am authorized to say that Judges Bastian and Burger join this dissent.

BURGER, *Circuit Judge*: I believe we should dismiss the petition for rehearing en banc for want of a justiciable

controversy, as Judge Danaher does, rather than merely deny it.

This episode presents on the one hand an example of a grave dilemma, which confronts those who engage in the healing arts and on the other hand some very basic and fundamental issues on the nature and scope of judicial power.[1] We can sympathize with the one but we cannot safely or appropriately temporize with the other; we have an obligation to deal with the basic question whether any judicially cognizable issue is presented when a legally competent adult refuses, on grounds of conscience, to consent to a medical treatment essential to preserve life. At the outset I would assume that we cannot make a judicial appraisal of justiciability on the basis of any consequences attributable to the order issued in the name of this court. The end, desirable as it obviously developed, cannot establish the existence of a case or controversy if such did not exist independent of the sequel to the enforced medical treatment.

"The touchstone to justiciability is injury to a legally protected right. . . ." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 140 (1950) (principal opinion). The threshold issue, therefore, is whether the hospital had a right which it was entitled to require the court to enforce. It is not always easy to separate the concepts of standing of a party and justiciability of an issue; the two tend to blend and merge at times. But it would seem beyond challenge that the party seeking relief has the burden of showing affirmatively a legally protected right which is invaded or is about to be invaded by an opposing party.

[1] Judge Miller's opinion has dealt with one phase of the problem, *i.e.*, whether, assuming *arguendo* the existence of a justiciable controversy, the moving party here took the steps necessary to invoke the court's jurisdiction and whether, assuming jurisdiction in the District Court, jurisdiction was properly exercised here. I agree with his analysis.

Judge Washington's view that the order of September 17, 1963, has no continuing vitality serves only to underscore the failure of a majority of this court to pass definitively upon the issues presented to us.

What, then, is the legally enforceable "right" of the hospital in this context?

We can assume first that a hospital, like a doctor, has certain responsibilities and duties toward a person who, by choice or emergency, comes under its care. No affirmative act of appellee is suggested as invading or threatening any right of the hospital. So we must decide whether an "invasion" of legal right can be spelled out of a relationship between the patient's refusal to accept a standard medical treatment thought necessary to preserve life and the possible consequences to the hospital if, relying on her refusal of consent, it fails to give a transfusion and death or injury follows. The possible economic impact, apart from the moral implications inherent in its responsibilities, perhaps presented an arguable basis for the hospital's claim of protected economic right. It stood in an unenviable "Good Samaritan" posture when the patient categorically refused to consent to a blood transfusion called for by a medical emergency.[2] The choice between violating the patient's convictions of conscience and accepting her decision was hardly an easy one.

However, since it is not disputed that the patient and her husband volunteered to sign a waiver to relieve the hospital of any liability for the consequences of failure to effect the transfusion, any claim to a protected right in the economic damage sphere would appear unsupported.

Can a legally protected right arise out of some other duty-right of the hospital toward a patient, such as a moral obligation to preserve life at all costs?

For me it is difficult to construct an actionable or legally protected right out of this relationship. The affirmative enforcement of a right growing out of a possible moral duty

[2] The existence of an emergency is assumed although there is no record to show when the patient reached the hospital or when an emergency was thought to arise.

of the hospital toward a patient does not seem to meet the standards of justiciability especially when the only remedy is judicial compulsion touching the sensitive area of conscience and religious belief.[*]

> Limitation on "the judicial Power of the United States" is expressed by the requirement that a litigant must have "standing to sue" or, more comprehensively, that a federal court may entertain a controversy only if it is "justiciable." Both characterizations mean that a court will not decide a question unless the nature of the action challenged, the kind of injury inflicted, and the relationship between the parties are such that judicial determination is consonant with what was, generally speaking, the business of the Colonial courts and the courts of Westminster when the Constitution was framed.

Joint Anti-Fascist Refugee Committee v. McGrath, supra at 150 (separate opinion of Frankfurter, J.).

The Standard suggested by Mr. Justice Frankfurter is not archaic or obsolete any more than is the Constitution simply because it is nearly 200 years old. Moreover, Justice Frankfurter did not mean that this concept of justiciability would forever rigidly embalm all remedies and all actions in the mold of 18th century courts. Legal claims concerning atomic energy and the space age may well arise and the standard suggested by Justice Frankfurter is sufficiently malleable to encompass claims and remedies not dreamed of 200 years ago or even a generation ago, provided always they are within the general competence of the courts. What he was pointing to was the appropriateness for *judicial* treatment, the fitness for *adjudication*, which in turn depend upon a showing of invasion of a legally protected right.

[*] Because Mrs. Jones could invoke judicial power to *enjoin* a blood transfusion does not mean, as a corollary, that the hospital has a comparable right to *compel* it.

The breadth of the Frankfurter definition also makes manifest that he was not addressing himself narrowly to the limited nature of federal judicial power as distinguished from that of state courts of general jurisdiction, for the Colonial courts and those of Westminster of the 1780's were courts of general jurisdiction. Rather he was attempting to contrast the proper scope of judicial business with the business of legislatures, executives and sovereigns, see *Pauling v. McNamara*, No. 17797, D. C. Cir., Dec. 23, 1963, and, by inference, those matters which are strictly of private concern and thus beyond reach of all governmental power. We cannot neatly divide all of life's problems and decisions into three compartments and assign one to each of the three great Branches of Government.

Mr. Justice Brandeis, whose views have inspired much of the "right to be let alone" philosophy, said in *Olmstead v. United States*, 277 U.S. [illegible] (1928), (dissenting opinion):

> The makers of our Constitution * * * sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights, and the right most valued by civilized man.

Nothing in this utterance suggests that Justice Brandeis thought an individual possessed these rights only as to *sensible* beliefs, *valid* thoughts, *reasonable* emotions, or *well-founded* sensations. I suggest he intended to include a great many foolish, unreasonable and even absurd ideas which do not conform, such as refusing medical treatment even at great risk.

That judicial power is narrow and limited is a concept deeply embedded in our System. Thus the need for external

[1] The cases in which vaccination was compelled for smallpox and other communicable diseases are not in point for such compulsion was enforcement of public health measures under the police power.

restraints on the powers of Federal Judges was plainly an important corollary to their constitutionally secured tenure. It was quite as clear in the 1780's as it is today that men are not notorious for exercising self-restraint when they possess both permanent tenure *and* plenary power. Under our System no single Branch of Government has both, and no single Branch of Government could safely be entrusted with both.

Confronted by a unique episode such as this, it seems to me we must inquire where an assumption of jurisdiction over such matters could lead us. Physicians, surgeons and hospitals—and others as well—are often confronted with seemingly irreconcilable demands and conflicting pressures. Philosophers and theologians have pondered these problems and different religious groups have evolved different solutions; the solutions and doctrines of one group are sometimes not acceptable to other groups or sects. Various examples readily come to mind: a crisis in childbirth may require someone to decide whether the life of the mother or the child shall be sacrificed; absent a timely and decisive choice both may die. May the physician or hospital require the courts to decide? A patient may be in a critical condition requiring, in the minds of experts, a certain medical or surgical procedure. If the patient has objections to that treatment based on religious conviction, or if he rejects the medical opinion, are the courts empowered to decide for him?

There is another interesting facet which needs only to be mentioned briefly: the emergent nature of the factual situation confronting the hospital demonstrates that what on its face was "interlocutory relief" was really the ultimate relief. Once granted, no more remained for any court to consider. Were we to view the claims now as moot, we would have to acknowledge their mootness as soon as the challenged order was acted upon. This was in effect not only a form of instant relief but perhaps also instant mootness. This does not appear to be a situation of preserving a status quo in order to preserve jurisdiction but rather one where the interim relief was the total relief.

Some of our greatest jurists have emphasized the need for judicial awareness of the limits on judicial power which is simply an acknowledgement of human fallibility. Cardozo, in *The Nature of the Judicial Process*, said:

> The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life." Wide enough in all conscience is the field of discretion that remains.

It is at the periphery of the boundaries of power where the guidelines are less clear that an appealing claim presents difficult choices, but this is precisely the area in which restraint is called for in light of the absolute nature of our powers and the finality which often, as here, attends our acts. But we should heed Cardozo's counsel of restraint and reconcile ourselves to the idea that there are myriads of problems and troubles which judges are powerless to solve; and this is as it should be. Some matters of essentially private concern and others of enormous public concern, are beyond the reach of judges. *Cf. Paulina v. McNamara, supra.*

I am authorized to state that Judges Wilbur K. Miller and Bastian join in the above views.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Misc. No. 2189

APPLICATION OF THE PRESIDENT AND DIRECTORS OF GEORGETOWN COLLEGE, INC., A BODY CORPORATE

On Application for an Emergency Writ

Filed February 3, 1964

Before WRIGHT, *Circuit Judge*, in Chambers.

WRIGHT, *Circuit Judge*: Attorneys for Georgetown Hospital applied for an emergency writ at 4:00 P.M., Sep-

[1] The text of the document embodying the application read:

"In re: APPLICATION OF THE PRESIDENT AND DIRECTORS OF GEORGETOWN COLLEGE, INC., A BODY CORPORATE

"This cause having come on to be heard upon application of The President and Directors of Georgetown College, Inc., a body corporate, owning and operating Georgetown University Hospital, and it being represented by counsel for the applicant that a Mrs. Jesse E. Jones is presently a patient at Georgetown University Hospital and that she is in extremis and it being further represented that the physician in attendance, the chief resident at Georgetown University Hospital, Edwin Westura, is of the opinion that blood transfusions are necessary immediately in order to save her life and it being further represented by the applicant that consent to the administration thereof can be obtained neither from the patient nor her husband; it is therefore

"ORDERED that the applicant acting through its duly accredited and licensed physicians in attendance may administer such transfusions as are in the opinion of the physicians in attendance necessary *to save her life*."

tember 17, 1963, seeking relief from the action of the United States District Court for the District of Columbia denying the hospital's application for permission to administer blood transfusions to an emergency patient. The application recited that "Mrs. Jesse E. Jones is presently a patient at Georgetown University Hospital," [she] is in extremis.

[The initial papers, set out in Note 1, *supra*, had been presented to the District Court, Tamm, J., in chambers. These papers may well be taken as a complaint in a civil action in the nature of a petition or application in equity. Rules 3 and 81(a), F. R. Civ. P. Under Rule [illegible], F. R. Civ. P., "the judge may permit the papers to be filed with him" instead of the clerk. "[U]nder this provision when it is necessary for a party to obtain immediate court action which would be delayed by first filing papers with the clerk, a party may file his papers with the judge, if the latter permits such filing, and obtain such order as the judge deems proper. A typical instance for effective use of this subdivision is where the plaintiff seeks a restraining order and would be delayed by first filing a complaint with the clerk and then going to a judge. * * * [T]he plaintiff may file his complaint with the judge and obtain a restraining order immediately." 2 Moore, Federal Practice ¶ 5.11 at 1357 (2d ed. 1962); see also *id.* ¶ 5.04 at 712.

Though the papers may be irregular in form, in substance they perform the office of a complaint, indicating the nature of the matter in dispute, the grounds of jurisdiction, and the relief sought. [Rule 8(a)(1), F. R. Civ. P.] Defects in the complaint are not fatal under the Rules, certainly where the deficiency is explained by lack of time or skill or the like. Compare *Dinsmore v. Dinsmore*, 2 Cir., 139 F. 2d 774 (1944), 1A Barron & Holtzoff, Federal Practice and Procedure § 255 (Wright ed. 1960). In any case, it is well settled that shortcomings in the complaint are matters for challenge by motion, and do not go to jurisdiction. *Bell v. Hood*, 327 U. S. 678, 682 (1946).

Even "the lack of a complaint is not jurisdictional and * * * when there has been no timely objection, a valid judgment may properly be entered in such an informal litigation." 2 Moore, Federal Practice ¶ 3.04 at 710. In *Engineers Ass'n v. Speed Autoscope Co., Ltd.*, 2 Cir., 251 F. 2d 155, 157 (1957), *cert. denied*, 356 U. S. 932 (1958), where a proceeding was commenced by petition and motion, without objection in the District Court to the absence of a complaint, the cause was held to be properly before the court.

We are not advised whether or not counsel intended to file new or amended pleadings articulating in more formal terms the nature of the relief demanded, *e.g.*, declaratory judgment. The patient's rapid recovery may have led both the hospital and the patient to abstain from taking subsequent action in the District Court. The patient, Mrs. Jones, did file a motion for rehearing *en banc* in this court, asking this court to declare the rights of the parties *inter se*. See Note 5, *infra*.

according to the attending physician "blood transfusions are necessary immediately in order to save her life," and "consent to the administration thereof can be obtained neither from the patient nor her husband." The patient and her husband based their refusal on their religious beliefs as Jehovah's Witnesses. The order sought provided that the attending physicians "may" administer such transfusions to Mrs. Jones as might be "necessary to save her life." After the proceedings detailed in Part IV of this opinion, I signed the order at 5:20 P.M.

I.

Initially, it may be well to put this matter into fuller legal context, including "the nature of the controversy, the relation and interests of the parties, and the relief sought in the instant case." The application was in the nature of a petition in equity to the United States District Court for the District of Columbia, a court of general jurisdiction. Though not fully articulated therein, the application sought a decree in the nature of an injunction and declaratory

[1] The additional representations of the doctors on duty, made orally during consideration of the order, were thereafter reduced to writing in affidavit form and filed.

[2] See Note 1, *supra*. The phrase "to save her life" was added to the last sentence of the original application. A memorandum order entered at the same time read as follows:

"The applicant having appeared before me for the issuance of a writ permitting the applicant to administer such transfusions as are in the opinion of the physicians in attendance necessary to save the life of Mrs. Jesse E. Jones and it appearing that on September 17, 1963, the District Court denied such application, and a hearing having been conducted before me at which all the interested parties were present and upon the consideration had thereon, I signed, pursuant to the provisions of Section 1651, Title 28, United States Code, the attached order granting such relief which counsel had presented to the District Court Judge and which had been denied by him. It is therefore

"ORDERED that the Clerk of this court is hereby directed to file this memorandum order and attachment."

[3] *Atlas Life Ins. Co. v. Hardesty*, 300 U. S. 227, 241 (1937).

judgment" to determine the legal rights and liabilities between the hospital and its agents on the one hand, and Mrs. Jones and her husband on the other. Mrs. Jones subsequently appeared in the cause, in this court, as respondent to the application. The treatment proposed by the hospital in its application was not a single transfusion, but a series of transfusions. The hospital doctors sought a court determination before undertaking either this course of action or some alternative. The temporary order issued was more limited than the order proposed in the original application, in that the phrase "to save her life" was added, thus limiting the transfusions in both time and number. Such a temporary order to preserve the life of the patient was necessary if the cause were not to be mooted by the death of the patient.

At any time during the series of transfusions which followed, the cause could have been brought on for hearing by motion before the motions division of this court, and the order either vacated, continued, or superseded by an order of a more permanent nature, such as an interlocutory injunction. Neither the patient, her husband, nor the hospital, however, undertook further proceedings in this court or in

[1] The Declaratory Judgment Act, 28 U. S. C. §§ 2201, 2202; see also Rule 57, F. R. Civ. P. "[A] party to a contract is not compelled to wait until he has committed an act which the other party asserts will constitute a breach, but may seek relief by declaratory judgment and have the controversy adjudicated in order that he may avoid the risk of damages or other untoward consequence." *Keener Oil & Gas Co.* v. *Consolidated Gas Utilities Corp.*, 10 Cir., 190 F. 2d 985, 989 (1951). Put more generally, the Declaratory Judgment Act allows "prospective defendants to sue to establish their nonliability." *Beacon Theatres* v. *Westover*, 359 U. S. 500, 504 (1959). And "it is not essential that there be a direct threat of litigation by another" in order to invoke the Declaratory Judgment Act. It is sufficient if "such a threat is implicit in the attitude of the other [. . .]." *Simmonds Aerocessories* v. *Elastic Stop Nut Corp.*, 3 Cir., 257 F. 2d 485, 490 (1958). See also Note 9, *infra*.

[2] The motions division of this court that week consisted of Judges Wilbur K. Miller, Fahy and Wright. At the time counsel appeared before this court, Judge Fahy was attending the Judicial Conference of the United States and Judge Miller was also not in the courthouse.

the District Court during the succeeding days while blood was being administered to the patient.[*]

II.

That a case or controversy existed in the District Court, and before this court, seems clear under the tests laid down by the Supreme Court:

> "A 'controversy' in this sense must be one that is appropriate for judicial determination. *Osborn* v. *United States Bank*, 9 Wheat. 738, 819. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. *United States* v. *Alaska S. S. Co.*, 253 U. S. 113, 116. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. *South Spring Gold Co.* v. *Amador Gold Co.*, 145 U. S. 300, 301; *Fairchild* v. *Hughes*, 258 U. S. 126, 129; *Massachusetts* v. *Mellon*, 262 U. S. 447, 487, 488. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. See *Muskrat* v. *United States*, *supra*; *Texas* v. *Interstate Commerce Comm'n*, 258 U. S. 158, 162; *New Jersey* v. *Sargent*, 269 U. S. 328, 329, 330; *Liberty Warehouse Co.* v. *Grogans*, 273 U. S. 70; *New York* v. *Illinois*, 274 U. S. 488, 490; *Willing* v. *Chicago Auditorium Assn.*,

[*] After the writ had become *functus officio* by its own terms, the life of the patient no longer being in danger, and more than ten days after its issuance, *cf.* Rule 65(b), F. R. Civ. P., the patient, on October 14 filed a petition in this court, as respondent to the application, seeking to have the order issuing the writ reheard *en banc*. Substantive constitutional arguments as to freedom of religion, and the right of liberty, were advanced, and the question of mootness was dealt with. Georgetown Hospital filed a reply brief. After consideration, this court *en banc* denied the petition for rehearing *en banc*.

277 U. S. 274, 289, 290; *Arizona* v. *California*, 283 U. S. 423, 463, 464; *Alabama* v. *Arizona*, 291 U. S. 286, 291; *United States* v. *West Virginia*, 295 U. S. 463, 474, 475; *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 324. Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages. *Nashville, C. & St. L. Ry. Co.* v. *Wallace*, *supra*, p. 263; *Tutun* v. *United States*, 270 U. S. 568, 576, 577; *Fidelity National Bank* v. *Swope*, 274 U. S. 123, 132; *Old Colony Trust Co.* v. *Commissioner*, *supra*, p. 725. And as it is not essential to the exercise of the judicial power that an injunction be sought, allegations that irreparable injury is threatened are not required. *Nashville, C. & St. L. Ry. Co.* v. *Wallace*, *supra*, p. 264.

Aetna Life Ins. Co. v. *Haworth*, *supra* Note 5, 300 U. S. at 240-241.

Clearly, the issue raised here is "justiciable," that is, of the type that courts may be called upon to decide. Were a patient in a hospital, unable to leave, to protest its planned treatment, for the most fundamental reasons, it could hardly be questioned that the judiciary would have jurisdiction to rule upon the issue of the patient's and the hospital's rights and duties. In this area, failure of the courts to declare the law would not place the responsibility for decision in the executive or legislative branches of government. Judicial abdication would create a legal vacuum to be filled only by the motions, and remedies, of the private parties themselves. And if the courts are to act in this area, damage suits *post facto* are a poor substitute for timely declaratory or injunctive relief. Thus if Mrs. Jones had brought an action to restrain the hospital from administering the transfusions, a justiciable controversy would certainly have

been presented. The fact that it was the hospital which sought judicial declaration of its rights does not make the controversy less justiciable.[6] Moreover, while the question presented is of utmost importance to those concerned, it is of such infrequent occurrence as to be unlikely to attract the attention of the legislature. Courts sit to decide such questions.

III.

Reference to the Court of Appeals, immediately after the denial of the application by the District Court, was proper under the power of federal courts to issue "all writs necessary or appropriate in aid of their respective jurisdictions." 28 U. S. C. § 1651.[7] Such "authority is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected." *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 25 (1943). These "common law writs, like equitable remedies, may be granted or withheld in the sound discretion of the court." *Ibid.* The Federal Rules of Civil Pro-

[6] "A justiciable controversy is presented when a plaintiff, wishing to embark on a course of conduct, seeks to prevent another from interfering with it. *Technical Tape Corp.* v. *Minnesota Mining & Mfg. Co.*, 2 Cir., 200 F. 2d 876 (1952); *General Electric Co.* v. *Refrigeration Patents Corp.*, W. D. N. Y., 65 F. Supp. 75 (1946). The only special questions relevant to the exercise of such jurisdiction are: 'Will the plaintiff really take the proposed action and, if so, exactly what action?' Will the defendant really then interfere with him, and, if so, exactly how?" HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 139 (1953). Here the answers to these questions had been made perfectly clear by the actions of the doctors, the hospital's officials, and the patient's husband. See also Note 6, *supra*.

[7] The full text of the All Writs Statute, 28 U. S. C. § 1651, is:

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

"(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction."

cedure, Rule 62(g), recognize the "power of an appellate court *or of a judge or justice thereof* to * * * grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered." (Emphasis added.) *Cf. Toledo Newspaper Co.* v. *United States*, 6 Cir., 237 Fed. 986 (1916), *affirmed*, 247 U. S. 402 (1918); *Scripps-Howard Radio* v. *Comm'n*, 316 U. S. 4 (1942). And this court has provided in Rule 11 of its General Rules that an "injunction pending appeal from the district court in civil cases shall be governed by the applicable provisions of the Federal Rules of Civil Procedure," citing, *inter alia*, Rule 62(g), F. R. Civ. P. Of course, whether or not there was jurisdiction to decide the merits, until the question of jurisdiction is determined, there was "authority from the necessity of the case to make orders to preserve the existing conditions and the subject of the petition * * *." *United States* v. *Shipp*, 203 U. S. 563, 573 (1906). Clearly there was "power to preserve existing conditions while * * * determining [the] authority to grant injunctive relief." *United States* v. *Mine Workers*, 330 U. S. 258, 293 (1947).

The power of a single judge to issue such emergency temporary writs cannot be disputed. 28 U. S. C. § 1651; Rules 6 and 11, General Rules, D. C. Cir.; Rule 62(g), F. R. Civ. P.; Rules 50 and 51.1, Sup. Ct. Rules. The power of a single circuit judge to grant temporary writs has been exercised in several cases in the recent past. See, *e.g.*,

[1] It has been said that "* * * to grant writs to protect the Court's jurisdiction to inquire into the matter is one of the most usual functions of an individual Justice." *United States ex rel. Knauff* v. *Metcalfe* (unreported) (opinion of Mr. Justice Jackson), quoted in ROBERTSON & KIRKHAM, JURISDICTION OF THE SUPREME COURT § 138 at 894 n. 10 (Wolfson & Kurland ed. 1951). See, also, *Rosenberg* v. *United States*, 346 U. S. 273, 285, 288, 294, 297, 301-302 (1953), affirming the power of a single Justice to grant a stay of execution to preserve the *status quo* until a legal issue could be decided by the whole Court; and *Mercantile* v. *Esso*, 83 S. Ct. 10 (1962), in which Mr. Justice Black, acting alone, vacated stays granted below and issued his own injunction.

Arrow Transp. Co. v. *Southern R. Co.*, 372 U. S. 658, 662 n. 4 (1963); *Aaron* v. *Cooper*, 8 Cir., 261 F. 2d 97, 101 n. 1 (1958); *Woods* v. *Wright*, 5 Cir., 8 RACE REL. L. REP. 445 (May 22, 1963). Judge Tuttle's action in *Woods* v. *Wright*, *supra*, cites 28 U. S. C. § 1651(a) and Rule 62(g), F. R. Civ. P., in ordering, pending the taking of an appeal, that a group of Negro students be readmitted to the Birmingham public schools. The Eighth Circuit's discussion of the power in *Aaron* v. *Cooper*, *supra*, shows the familiarity of that Circuit with its exercise.[1] And in *Arrow Transp. Co.* v. *Southern R. Co.*, *supra*, the Supreme Court recognized this power as recently as last year, characterizing a temporary restraining order granted by "[o]ne judge of the Court of Appeals" as "the *Court of Appeals*' restraining order." (Emphasis supplied.) This authority of a single circuit judge or Circuit Justice has long been exercised,[2] and was sustained by the Supreme Court as long ago as 1855. *State of Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 59 U. S. (18 How.) 421 (1855).

The power recognized by Rule 62(g) and the All Writs Statute inheres in the single Supreme Court Justice and the single circuit court judge equally, each exercising the same power within the "respective jurisdictions" of his court. 28 U. S. C. § 1651; 6 MOORE, FEDERAL PRACTICE ¶ 54.10[2] at 61, text at 61.[3] "The extent to which federal

[1] Fauntroy, with this power of a single circuit judge to act on petitions or applications for relief pending appeal is also shown by various provisions in the rules of the several circuits. See Rule 26(5), 1 Cir.; Rule 30(3), 3 Cir., Rule 33, 4 Cir.; Rule 15.6, 9 Cir.; Rule 22.3, 10 Cir.

[2] Compare Act of March 2, 1793, § 5, 1 Stat. 334; Act of April 10, 1869, § 2, 16 Stat. 44; Act of June 1, 1872, § 7, 17 Stat. 197; REV. STAT. §§ 718, 719 (1875).

[3] Rule 6 of this court's General Rules provides that "[e]xcept as otherwise provided in these rules, the practice in this court shall so far as practicable be the same as in the Supreme Court of the United States." Rule 50 of the Supreme Court Rules provides for "Applications to individual justices; practice in chambers"; Rule 51.1 provides that "[a] writ of injunction may be granted by any justice in cases where they might be granted by the court."

statutes empower a Supreme Court justice to act individually is not widely realized. Broadest has been his power to issue injunctions necessary to the exercise of the Court's jurisdiction, both original and appellate. [Citations omitted.] This power is now apparently embodied in 28 U. S. C. § 1651(b) (1948) (authorizing issuance of alternative writs)." 62 HARV. L. REV. 311 (1948). And Professor Moore has said: "By virtue of this provision [§ 1651(b)] an individual Justice of the Supreme Court can give interim relief pending action by the full Court, as by granting or staying an injunction." MOORE, JUDICIAL CODE COMMENTARY ¶ 0.03(53) at 603 (1949) (citations omitted); see also 6 MOORE, FEDERAL PRACTICE ¶ 54.10[3] at 83-84.

Additionally, "if this broadly phrased subsection [(b) of § 1651] is not construed to grant this power, [to issue injunctions] to individual Justices, then the power may be found in 28 U. S. C. § 1651(a) which, although it merely confers upon 'courts' the power to 'issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law', may nevertheless be construed as also conferring upon individual Justices *in judges* the power to issue such writs where such issuance is customary. Cf. Bennett v. Bennett, 3 Fed. Cas. No. 1318 [power of lower court judge]." ROBERTSON & KIRKHAM, JURISDICTION OF THE SUPREME COURT § 438, at 893 n. 10 (emphasis added). Illustrative examples of the exercise of this power are given in STERN & GRESSMAN, SUPREME COURT PRACTICE § 15-23, "Application to an individual Justice—practice in chambers." (3d ed. 1962.)

IV.

Let us now reconstruct the narrative of events through the medium of the contemporaneous Memorandum of Facts filed in this cause, the substance of which is as follows:

Mrs. Jones was brought to the hospital by her husband for emergency care, having lost two thirds of her body's blood supply from a ruptured ulcer. She had no personal

physician, and relied solely on the hospital staff. She was a total hospital responsibility. It appeared that the patient, age [redacted] mother of a seven-month-old child, and her husband were both Jehovah's Witnesses, the teachings of which sect, according to their interpretation, prohibited the injection of blood into the body. When death without blood became imminent, the hospital sought the advice of counsel, who applied to the District Court in the name of the hospital for permission to administer blood. Judge Tamm of the District Court denied the application, and counsel immediately applied to me, as a member of the Court of Appeals, for an appropriate writ.

I called the hospital by telephone and spoke with Dr. Westura, Chief Medical Resident, who confirmed the representations made by counsel. I then upon proceeded with counsel to the hospital, where I spoke to Mr. Jones, the husband of the patient. He advised me that, on religious grounds, he would not approve a blood transfusion for his wife. He said, however, that if the court ordered the transfusion, the responsibility was not his. I advised Mr. Jones to obtain counsel immediately. He thereupon went to the telephone and returned in 10 or 15 minutes to advise that he had taken the matter up with his church and that he had decided that he did not want counsel.

I asked permission of Mr. Jones to see his wife. This he readily granted. Prior to going into the patient's room, I again conferred with Dr. Westura and several other doctors assigned to the case. All confirmed that the patient would die without blood and that there was a better than 50 per cent chance of saving her life with it. Unanimously they strongly recommended it. I then went inside the patient's room. Her appearance confirmed the urgency which had been represented to me. I tried to communicate with her, advising her again as to what the doctors had said. The only audible reply I could hear was "Against my will." It was obvious that the woman was not in a mental condition to make a decision. I was reluctant to press her be-

cause of the seriousness of her condition and because I felt that to suggest repeatedly the imminence of death without blood might place a strain on her religious convictions. I asked her whether she would oppose the blood transfusion if the court allowed it. She indicated, as best I could make out, that it would not then be her responsibility.

I returned to the doctors' room where some 10 to 12 doctors were congregated, along with the husband and counsel for the hospital. The President of Georgetown University, Father Bunn, appeared and pleaded with Mr. Jones to authorize the hospital to save his wife's life with a blood transfusion. Mr. Jones replied that the Scriptures say that we should not drink blood, and consequently his religion prohibited transfusions. The doctors explained to Mr. Jones that a blood transfusion is totally different from drinking blood in that the blood physically goes into a different part and through a different process in the body. Mr. Jones was unmoved. I thereupon signed the order allowing the hospital to administer such transfusions as the doctors should determine were necessary to save her life.

V.

This opinion is being written solely in connection with the emergency order authorizing the blood transfusions "to save her life." It should be made clear that no attempt is being made here to determine the merits of the underlying controversy. Actually, the issue on the merits is *res nova*. Because of the demonstrated imminence of death from loss of blood, signing the order was necessary to maintain the *status quo* and prevent the issue respecting the rights of the parties in the premises from becoming moot before full consideration was possible. But maintaining the *status quo* is not the only consideration in determining whether an emergency writ should issue. The likelihood of eventual success on appeal is of primary importance, and thus must be here considered.

Before proceeding with this inquiry, it may be useful to state what this case does not involve. This case does not involve a person who, for religious or other reasons, has refused to seek medical attention. It does not involve a disputed medical judgment or a dangerous or crippling operation. Nor does it involve the delicate question of saving the newborn in preference to the mother. Mrs. Jones sought medical attention and placed on the hospital the legal responsibility for her proper care. In its dilemma, not of its own making, the hospital sought judicial direction.

It has been firmly established that the courts can order compulsory medical treatment of children for any serious illness or injury,[1] *e.g., People ex rel. Wallace* v. *Labrenz*, 411 Ill. 618, 104 N. E. 2d 769, *cert. denied*, 344 U. S. 824 (1952); *Morrison* v. *State*, Mo. App., 252 S. W. 2d 97 (1952); *Mitchell* v. *Davis*, Tex. Civ. App., 205 S. W. 2d 812 (1947), and that adults, sick or well, can be required to submit to compulsory treatment or prophylaxis for contagious diseases, *e.g., Jacobson* v. *Massachusetts*, 197 U. S. 11 (1905). And there are no religious exemptions from these orders, *e.g., People ex rel. Wallace* v. *Labrenz*, *supra*; *cf. Hamilton* v. *Regents*, 293 U. S. 245 (1934), *rehearing denied*, 293 U. S. 633 (1935). These principles were restated by the Supreme Court in *Prince* v. *Massachusetts*, 321 U. S. 158, 166-167 (1944):

> * * * Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parents' control * * *. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from com-

[1] The courts of the District of Columbia issue such orders both for necessary surgery, *e.g., In re Two Year Old Girl*, D. C. Juv. Ct., No. 44-753-J (January 23, 1964), and for necessary blood transfusions refused on religious grounds, *e.g., In re One and a Half Months Old Girl*, D. C. Juv. Ct., No. 41-633-J (June 7, 1963); *In re Two Day Old Infant*, D. C. Juv. Ct., No. 37-25-OJ (June 24, 1962).

pulsory vaccination for the child more than for himself on religious grounds. [*Jacobson* v. *Massachusetts*, 197 U. S. 11.] The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death. *People* v. *Pierson*, 176 N. Y. 201, 68 N. E. 243 [see also *State* v. *Chenoweth*, 163 Ind. 94, 71 N. E. 197; *Owens* v. *State*, 6 Okla. Cr. 110, 116 P. 345].

Of course, there is here no sick child or contagious disease. However, the sick child cases may provide persuasive analogies because Mrs. Jones was *in extremis* and hardly *compos mentis* at the time in question; she was as little able competently to decide for herself as any child would be. Under the circumstances, it may well be the duty of a court of general jurisdiction, such as the United States District Court for the District of Columbia, to assume the responsibility of guardianship for her, as for a child, at least to the extent of authorizing treatment to save her life. And if, as shown above, a parent has no power to forbid the saving of his child's life, *a fortiori* the husband of the patient here had no right to order the doctors to treat his wife in a way so that she would die.

The child cases point up another consideration. The patient, 25 years old, was the mother of a seven-month-old child. The state, as *parens patriae*, will not allow a parent to abandon a child, and so it should not allow this most ultimate of voluntary abandonments. The patient had a responsibility to the community to care for her infant. Thus the people had an interest in preserving the life of this mother.

Apart from the child cases, a second range of factors may be considered. It is suggested that an individual's liberty to control himself and his life extends even to the liberty to end his life. Thus, "in those states where attempted suicide has been made lawful by statute (or the lack of one), the refusal of necessary medical aid [to one's self], whether equal to or less than attempted suicide,

must be conceded to be lawful." Cawley, *Criminal Liability in Faith Healing*, 37 Minn. L. Rev. 48, 68 (1954). And, conversely, it would follow that where attempted suicide is illegal by the common law or by statute, a person may not be allowed to refuse necessary medical assistance when death is likely to ensue without it. Only quibbles about the distinction between misfeasance and non-feasance, or the specific intent necessary to be guilty of attempted suicide, could be raised against this latter conclusion.

If self-homicide is a crime, there is no exception to the law's command for those who believe the crime to be divinely ordained. The Mormon cases in the Supreme Court establish that there is no religious exception to criminal laws, and state *obiter* the very example that a religiously-inspired suicide attempt would be within the law's authority to prevent. *Reynolds v. United States*, 98 U. S. (8 Otto) 145, 166 (1878); *Romney v. United States*, 136 U. S. 1, 49-50 (1890). But whether attempted suicide is a crime is in doubt in some jurisdictions, including the District of Columbia.[16]

The Gordian knot of this suicide question may be cut by the simple fact that Mrs. Jones did not want to die. Her voluntary presence in the hospital as a patient seeking medical help testified to this. Death, to Mrs. Jones, was not a religiously-commanded goal, but an unwanted side effect of a religious scruple. There is no question here of interfering with one whose religious convictions counsel his death, like the Buddhist monks who set themselves afire. Nor are we faced with the question of whether the state should intervene to reweigh the relative values of life and death, after the individual has weighed them for himself and found life wanting. Mrs. Jones wanted to live.

A third set of considerations involved the position of the doctors and the hospital. Mrs. Jones was their responsi-

[16] *Compare* 22 D. C. Code § 2401 (1961) ("Whoever . . . kills *another* [etc.] is guilty of murder . . .") *with* 18 U. S. C. § 1111(a) (1948) ("Murder is the unlawful killing of *a human being* [etc.]") (emphasis added).

bility to treat. The hospital doctors had the choice of administering the proper treatment or letting Mrs. Jones die in the hospital bed, thus exposing themselves, and the hospital, to the risk of civil and criminal liability in either case.[17] It is not certain that Mrs. Jones had any authority to put the hospital and its doctors to this impossible choice. The normal principle that an adult patient directs her doctors is based on notions of commercial contract which may have less relevance to life-or-death emergencies. It is not clear just where a patient would derive her authority to command her doctor to treat her under limitations which would produce death. The patient's counsel suggests that this authority is part of constitutionally protected liberty. But neither the principle that life and liberty are inalienable rights, nor the principle of liberty of religion, provides an easy answer to the question whether the state can prevent martyrdom. Moreover, Mrs. Jones had no wish to be a martyr. And her religion merely prevented her consent to a transfusion. If the law undertook the responsibility of authorizing the transfusion without her consent, no problem would be raised with respect to her religious practice. Thus, the effect of the order was to preserve for Mrs. Jones the life she wanted without sacrifice of her religious beliefs.

The final, and compelling, reason for granting the emergency writ was that a life hung in the balance. There was no time for research and reflection. Death could have mooted the cause in a matter of minutes, if action were not taken to preserve the *status quo*. To refuse to act, only to find later that the law required action, was a risk I was unwilling to accept. I determined to act on the side of life.

[17] Whether or not a waiver signed by a patient *in extremis* would protect the hospital from civil liability, it could not be relied on to prevent criminal prosecution. Death resulting from failure to extend proper medical care, where there is a duty of care, is manslaughter in the District of Columbia. *Jones* v. *United States*, 113 U. S. App. D. C. 352, 355, 308 F. 2d 307, 310 (1962).

APPENDIX C

EXHIBIT A

ORDER

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Division

In re: APPLICATION OF THE PRESIDENT AND DIRECTORS OF GEORGETOWN COLLEGE, INC., A BODY CORPORATE

United States Court of Appeals
for the District of Columbia Circuit
FILED SEP 17 1963
Nathan J. Paulson
Clerk

This cause having come on to be heard upon application of The President and Directors of Georgetown College, Inc., a body corporate, owning and operating Georgetown University Hospital, and it being represented by counsel for the applicant that a Mrs. Jesse E. Jones is presently a patient at Georgetown University Hospital and that she is in extremis and it being further represented that the physician in attendance, the chief resident at Georgetown University Hospital, Edwin Westura, is of the opinion that blood transfusions are necessary immediately in order to save her life and it being further represented by the applicant that consent to the administration thereof can be obtained neither from the patient nor her husband; it is therefore

ORDERED that the applicant acting through its duly accredited and licensed physicians in attendance may ad-

minister such transfusions as are in the opinion of the physicians in attendance necessary to save her life.

Denied,
/s/ Tamm, J.
9/17/63

/s/ J. Skelly Wright
Judge

United States Circuit Judge
September 17th, 1963
5:20 P.M.
Georgetown Hospital
Washington, D.C.

MEMORANDUM ORDER

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 2189 September Term, 1963

In re: APPLICATION OF PRESIDENT AND DIRECTORS OF GEORGETOWN COLLEGE, INC., A BODY CORPORATE

United States Court of Appeals
for the District of Columbia Circuit
FILED SEP 17 1963
Nathan J. Paulson
Clerk

The applicant having appeared before me for the issuance of a writ permitting the applicant to administer such transfusions as are in the opinion of the physicians in attendance necessary to save the life of Mrs. Jesse E. Jones and it appearing that on September 17, 1963, the District Court denied such application; and a hearing having been conducted before me at which all the interested parties were

present and upon due consideration had thereon, I signed, pursuant to the provisions of Section 1651, Title 28, United States Code, the attached order granting such relief which counsel had presented to the District Court Judge and which had been denied by him. It is therefore

ORDERED that the Clerk of this court is hereby directed to file this memorandum order and attachment.

Dated: /s/ J. SKELLY WRIGHT
J. Skelly Wright
Judge of the United States Court of Appeals
for the District of Columbia Circuit

EXHIBIT B

MEMORANDUM

Misc. 2189

In re: APPLICATION OF THE PRESIDENT AND DIRECTORS OF GEORGETOWN COLLEGE, INC., A BODY CORPORATE

At 4:00 p.m. on September 17, 1963, Messrs. Edward Bennett Williams and Colman Stein, attorneys representing the Georgetown Hospital, called at my chambers with an application for an order to permit the Hospital to administer blood to an emergency patient who the doctors at the Hospital represented would die without it. It appeared that the patient, age 25, mother of a seven-month-old child, and her husband were both Jehovah's Witnesses, the teachings of which sect, according to their interpretation, prohibited the injection of blood into the body. Unsuccessful application for the order had first been made to Judge Tamm of the District Court immediately prior to counsel's appearance before me.

I called the Hospital by telephone and spoke with Dr. Westura, Chief Resident Physician, who confirmed the representations made by counsel. I thereupon proceeded with counsel to the Hospital, where I spoke to Mr. Jones, the husband of the patient. He advised me that, on religious grounds, he would not approve a blood transfusion for his wife. He said, however, that if the court ordered the transfusion, the responsibility was not his. I advised Mr. Jones to obtain counsel immediately. He thereupon went to the telephone and returned in 10 or 15 minutes to advise that he had taken the matter up with his church and that he had decided that he did not want counsel.

I asked permission of Mr. Jones to see his wife. This he readily granted. Prior to going in to the patient's room, I again conferred with Dr. Westura and several other doctors assigned to the case. All confirmed that the patient would die without blood and that there was a better than 50 per cent chance of saving her life with it. Unanimously they strongly recommended it. I then proceeded inside the patient's room. Her appearance confirmed the urgency which had been represented to me. I tried to communicate with her, advising her again as to what the doctors had said. The only audible reply I could hear was "Against my will." It was obvious that the woman was not in a mental condition to make a decision. I was reluctant to press her because of the seriousness of her condition and because I felt that to suggest repeatedly the imminence of death without blood might place a strain on her religious convictions. I asked her whether she would oppose the blood transfusion if the court allowed it. She indicated, as best I could make out, that it would not then be her responsibility.

I returned to the doctors' room where some 10 to 12 doctors were congregated, along with counsel for the Hospital and the husband. The President of Georgetown University, Father Flynn, appeared and pleaded with Mr. Jones to authorize the hospital to save his wife's life with a blood

transfusion. Mr. Jones replied that the Scriptures say that we should not drink blood, and consequently his religion prohibited transfusions. Father Bunn explained the meaning of the Scriptural passage, to which Mr. Jones referred, to no avail. The doctors explained to Mr. Jones that a blood transfusion is totally different from drinking blood in that the blood physically goes into a different part and through a different process in the body. Mr. Jones was unmoved. I thereupon signed the order allowing the Hospital to transfuse the patient.

Mrs. Jones had been brought to the Hospital for emergency care, having lost two thirds of her body's blood supply from a ruptured ulcer. She had no personal physician. She relied solely on the Hospital staff. She was a total Hospital responsibility. When death without blood became imminent, the Hospital was faced with the choice of turning the patient out of the Hospital for failure to accept medical treatment, which of course was impossible because of her condition, letting her die in bed, with whatever responsibility that would entail, or administering the blood. In their dilemma the Hospital authorities sought the advice of their counsel, who applied to the court in the name of the Hospital for permission to administer the blood. This court at the time of the application was unaware of any precise legal precedent for its action.[1] It was advised of similar cases respecting children.[2] But here the patient was a 25-year-old adult. Because of the demonstrated imminence of death from loss of blood, this court decided to sign the order to save the patient's life, in the event that subsequent research supported its au-

[1] There are, however, persuasive analogies. The Supreme Court has said that "if a wife religiously believed it was her duty to burn herself upon the funeral pile of her husband, it would not be beyond the power of the civil government to prevent her carrying her belief into practice." *Reynolds* v. *United States*, 98 U.S. (8 Otto) 145, 166 (1878); see *Mormon Church* v. *United States*, 136 U. S. 1, 49-50 (1889). And the Court has upheld the power of the state to subject adults, against their will, to vaccination. *Jacobson* v. *Massachusetts*, 197 U. S. 11 (1905).

[2] *E.g. People* v. *Pierson*, 176 N. Y. 201, 68 N. E. 243 (1903).

thority so to do. The court was also comforted by the apparent assurance from the patient herself as well as from her husband that if the court undertook the responsibility for authorizing the transfusion, they themselves would not be in violation of their religious beliefs.

/s/ J. SKELLY WRIGHT
United States Circuit Judge

September 19, 1963

EXHIBIT C

AFFIDAVIT IN THE APPLICATION OF PRESIDENT AND DIRECTORS OF GEORGETOWN COLLEGE, INC., A BODY CORPORATE

Misc. 2189

DISTRICT OF COLUMBIA: SS

Laurence H. Kyle, M. D., having been duly sworn, deposes and says:

1. He is the Professor and Chairman, Department of Medicine, Georgetown University School of Medicine and the Director of the Department of Medicine, Georgetown University Hospital.

2. On September 17, 1963, Mrs. Jessie E. Jones was admitted to the hospital for emergency care. At the time of her admittance and throughout the day the patient was suffering from gastrointestinal bleeding. Her Hematocrit of 14 percent indicated extensive loss of blood, and there was every indication that the loss of blood would continue.

3. The patient's total clinical picture by mid-afternoon clearly indicated that the patient's life could not be saved without blood transfusions being administered immediately.

4. Although the patient and her husband were advised that blood transfusions were immediately necessary to save the patient's life, they refused to give consent therefor.

/s/ LAURENCE H. KYLE, M. D.
Laurence H. Kyle, M. D.

Subscribed and sworn to before me this 20th day of September, 1963.

/s/ Virgil C. Judson
Notary Public D. C.
My Commission Expires Nov. 30, 1967.

AFFIDAVIT IN THE APPLICATION OF PRESIDENT AND DIRECTORS OF GEORGETOWN COLLEGE, INC., A BODY CORPORATE

Misc. 2189

DISTRICT OF COLUMBIA: SS

Joel D. Levinson, M. D., having been duly sworn, deposes and says:

1. He is an Intern assigned to the Department of Medicine, Georgetown University Hospital.

2. On September 17, 1963, Mrs. Jessie E. Jones was admitted to the hospital for emergency care. Throughout the day the patient suffered gastrointestinal bleeding which continued into the night. By mid-afternoon her general clinical appearance together with a Hematocrit of 14 per cent clearly indicated that the patient could not survive without immediate blood transfusions.

3. Although the patient and her husband were advised that blood transfusions were immediately necessary to

save the patient's life, they refused to give consent therefor.

/s/ JOEL LEVINSON
Joel D. Levinson, M. D.

Subscribed and sworn to before me this 20th day of September, 1963.

/s/ Virgil C. Judson
Notary Public D. C.
My Commission Expires Nov. 30, 1967.

AFFIDAVIT IN THE APPLICATION OF PRESIDENT AND DIRECTORS OF GEORGETOWN COLLEGE, INC., A BODY CORPORATE

Misc. 2189

DISTRICT OF COLUMBIA: SS

Melvin D. Small, M. D., having been duly sworn, deposes and says:

1. He is the Chief of Gastrointestinal Research at Georgetown University Hospital.

2. Mrs. Jessie E. Jones was admitted to the hospital for emergency care on the morning of September 17, 1963. At the time of her admittance and throughout the day she suffered excessive intestinal bleeding. With a Hematocrit of 14 percent she could not have undergone surgery or even have been anesthetized.

3. By mid-afternoon it was essential that blood transfusions be administered immediately if the patient's life was to be saved. Had she suffered the loss of another 100 cc's of blood, she might have gone into irreversible shock.

4. Although the patient and her husband were advised that blood transfusions were immediately necessary to save the patient's life, they refused to give consent therefor.

/s/ Melvin D. Smale, M. D.
Melvin D. Smale, M. D.

Subscribed and sworn to before me this 20th day of September, 1963.

/s/ Virgil C. Judson
Notary Public
My Commission Expires Nov. 30, 1967.

AFFIDAVIT IN THE APPLICATION OF PRESIDENT AND DIRECTORS OF GEORGETOWN COLLEGE, INC., A BODY CORPORATE

Misc. 2189

District of Columbia, ss

Edwin E. Westura, M. D., having been duly sworn, deposes and says:

1. He is the Chief Medical Resident at Georgetown University Hospital.

2. On September 17, 1963, Mrs. Jessie E. Jones was admitted to the hospital for emergency care at 6:00 a.m. At the time of her admittance, she was suffering extensive internal bleeding and hemorrhaging.

3. An examination of the patient disclosed gastro-intestinal bleeding. The patient's Hymatgerit was 14 per cent indicating loss of approximately two-thirds of her blood supply. During the morning and afternoon hours, efforts to stop the continued loss of blood were unavailing.

4. By mid-afternoon it became absolutely essential that the patient be administered blood transfusions immediately to save her life. Had she suffered another rapid loss of blood, death would have resulted in a matter of minutes, and any effort to save her life would have been unavailing.

5. Although the patient and her husband were advised that blood transfusions were immediately necessary to save the patient's life, they refused to give consent therefor.

/s/ Edwin E. Westura, M. D.
Edwin E. Westura, M. D.

Subscribed and sworn to before me this 20th day of September, 1963.

/s/ Virgil C. Judson
Notary Public D. C.
My Commission Expires Nov. 30, 1967.

EXHIBIT D

AFFIDAVIT

Misc. No. 2189

In Re: Application of the President and Directors of Georgetown College, Inc., a Body Corporate

James L. Jones, having been duly sworn, deposes and says:

1. That I am the husband of Jessie E. Jones the subject of the application.

2. That my wife and I had been at the Georgetown Hospital on September 17th from about 6:00 a.m.

3. That during the day we both had several long discussions with the hospital physicians explaining that we

disagree with blood transfusion because such consumption of blood is forbidden by the Bible and also because the information I have leads me to the conclusion that this practice is not advisable from a medical standpoint.

4. That in the course of conversation with the doctors involved I gave them as a full statement of my views the publication attached to this my affidavit as Exhibit 1 thereto.

5. That attached hereto as Exhibit 2 to this my affidavit the magazine, *Awake!* which contains some of the information upon which I rely.

6. That both my wife and I offered on several occasions to sign for the hospital a legal release that would relieve the hospital of liability in the event of my wife's death. Despite my several requests no such document was ever supplied.

/s/ James L. Jones
James L. Jones

Subscribed and sworn to before me this 7th day of October, 1963.

/s/ Samuel Blumenthal
Notary Public
District of Columbia

EXHIBIT E

AFFIDAVIT

Misc. No. 2189

In Re: Application of the President and Directors of Georgetown College, Inc., a Body Corporate

Jessie E. Jones, having been duly sworn deposes and says:

1. That I was the patient who was forced against my will to consume human blood.

2. That during the time I was at the hospital my husband and I both asked on several occasions for a document, in the form of a legal release to absolve the hospital from liability for anything that might happen to me.

3. That the hospital staff promised to provide such a release but did not do so.

/s/ JESSIE E. JONES
Jessie E. Jones

Subscribed and sworn to before me this 7th day of October, 1963.

/s/ Samuel Blumenthal
Notary Public
District of Columbia

EXHIBIT F

ORDER

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Misc. No. 2189 September Term, 1963

In re: APPLICATION OF PRESIDENT AND DIRECTORS OF GEORGETOWN COLLEGE, INC., A BODY CORPORATE

Before: Bazelon, Chief Judge, in Chambers.

The motion filed by Jessie E. Jones for an extension of

time up to and including October 14, 1963, within which to file a petition for rehearing is hereby granted.

Dated:

United States Court of Appeals
for the District of Columbia
FILED OCT 2 1963
Nathan J. Paulson
Clerk